Supreme Court, U.S.
FILED
MAY 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1734

In The
# Supreme Court of the United States
October Term, 1988

In re STACY LYNN P., a minor

JOHN R. P., JR.,
*Appellant,*

vs.

DEBRA L. B.,
*Appellee.*

**ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT**

## MOTION TO DISMISS

DIANNE R. OPHELIA,
*Counsel of Record*
Attorney at Law
*Counsel for Appellee*

and

KATHLEEN B. GOSHGARIAN
*Of Counsel*
Attorney at Law
800 M Street
Fresno, California 93721
(209) 268-4021

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

# TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 4

A. VIOLATION OF DUE PROCESS ..... 4

B. VAGUENESS OF PETITION ..... 10

CONCLUSION ..... 12

APPENDIX:

A. Statutory Provisions ..... App. 1

## TABLE OF AUTHORITIES

Page

CASES

*Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 ..... 10

*Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 ..... 10

*Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 ..... 11

*In Re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 ..... 11, 12

*Matthews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 ..... 9

*McGowan v. Maryland* (1961), 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 ..... 7

*People v. Campos* (1982), 131 Cal.App.3d 894 ..... 8

*People v. Irwin* (1984), 155 Cal.App.3d 891 ..... 7

*People v. Smith* (1968), 259 Cal.App.2d 868 ..... 7

*People v. Superior Court of Alameda County* (1977), 19 Cal.3d 338 ..... 5

*Prince v. Commonwealth of Massachusetts* (1944), 321 U.S. 804, 64 S.Ct. 438 ..... 5

*Santosky v. Kramer* (1982), 455 U.S. 748, 102 S.Ct. 1388, 71 L.Ed.2d 599 ..... 9, 10

*Serrano v. Priest* (1971), 5 Cal.3d 584 ..... 5, 9

*Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 ..... 4

*Tigner v. Texas* (1940), 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 ..... 7

*Wainwright v. Stone* (1973), 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 ..... 5

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV ..... 13

STATUTES

18 U.S.C. section 1 ..... 7

California Code of Civil Procedure section 469 ..... 10

California Civil Code section 232 ..... *passim*
Appellant's Appendix ..... E1 - 4

California Civil Code section 232.5 ..... 13

California Civil Code section 232.6 ..... 6, 13

California Penal Code section 17 ..... 6

California Penal Code section 278 ..... 6, 7, 8
Appellant's Appendix ..... E-5

California Penal Code section 278.5 ..... 6, 7
Appellant's Appendix ..... E5 - 6

California Penal Code section 273(a) ..... 7, 8
Appellant's Appendix ..... E4 - 5

California Penal Code section 647(a) ..... 7, 8
Appellant's Appendix ..... E-6

No. 87-1734

In The

# Supreme Court of the United States

October Term, 1988

In re STACY LYNN P., a minor

JOHN R. P., JR.,

*Appellant,*

vs.

DEBRA L. B.,

*Appellee.*

**ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT**

## MOTION TO DISMISS

## STATEMENT OF FACTS

The young Appellee and Appellant were married, and the only child of their marriage, STACY LYNN, was born on December 10, 1976. The parties remained together until March of 1978, when they separated. The Appellant took STACY violently and without Appellee's permission within a month following the Appellee's filing for Dissolution in Arizona. The Appellee retrieved STACY through a Writ of Habeas Corpus and, after the event with

Appellant, filed a petition for Dissolution in Nevada. Subsequent to these events, Appellee moved back to her mother's home in Fresno, California.

Sometime after having assumed residence in California, Appellee filed her petition for Dissolution in California, and sought an Order to Show Cause regarding custody and visitation in response to Appellant's erratic visitation demands after his arrival in Fresno, subsequent to some three (3) months of erratic telephone calls. (RT 106:22-25, RT 20/18-21-23, 21/4-25).

After visitation was established by the court, the Appellant utilized his first weekend-long visitation as an occasion to kidnap.

Ten (10) months later and after the use of a private investigator by the Appellee, Appellant and STACY were located in Colorado, where Appellant was living under one of several aliases. STACY was returned to her mother.

After STACY's life had resumed normalcy, the Appellant was granted slowly-increasing visitation, beginning initially with short visits in STACY's psychologist's office and expanding to day-long, unsupervised visitation by the fall of 1982.

During one of his day-long, unsupervised visits with STACY, soon after the visitation right was granted, Appellant again kidnapped her. Appellant and STACY were again found, this time submerged in Florida, living under new names and under new appearances. Appellant had kidnapped his child for a period of five (5) months upon this occasion.

Appellant returned to California and submitted to arrest. In late 1983, he was tried and sentenced to serve three (3) years in State Prison for violation of Penal Code Sections 278 and 278.5.

While Appellant was in prison, Appellee filed a petition to free STACY from Appellant's custody and control under Civil Code Section 232, to enable her second husband to adopt STACY.

Upon his release from prison, Appellant filed a Motion for an Order for psychiatric evaluation of STACY. This Motion was denied.

After a lengthy trial of the petition to free STACY from Appellant's custody and control, the trial court found that Appellant was displaying unfitness as a parent when he attempted to permanently deprive STACY of contact with her mother and when he "kept the pot boiling" as far as STACY's ability to freely settle down and know that she would no longer be subject to traumatic upheavals in her life. (Appellant's Appendix A-5).

During the trials and subsequent appeals, Appellee has contended that Civil Code Section 232 is certainly specific enough to enable Appellant to determine what the facts of the crime are in relation to the Petition to terminate his parental rights. She has contended that there is no unconstitutional discrimination against felons, and that any difference in the treatment of felons as opposed to persons who have committed misdemeanors is justified because of the manner in which the two degrees of crime are segregated and because of the state's interest in providing for welfare of its children. The Appellee has

argued that her petition to terminate the Appellant's parental rights sufficiently informed the Appellant of the charges that he would have to meet to enable him to adequately defend his position.

---

## ARGUMENT

### VIOLATION OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Appellant proposed two arguments relating to the violation of his right to due process: The entire State of California failed to subject Civil Code Section 232 to strict scrutiny, and that the classification of individuals under Civil Code Section 232 bears no rational relation to a legitimate state purpose. These two concepts are so inextricably intertwined that Petition addresses both simultaneously.

There is no argument that parents possess fundamental rights in the custody, care, and nurture of their children. (*Stanley v. Illinois* (1972) 405 U.S. 645, 651-652, 92 S.Ct. 1208, 31 L.Ed.2d 551).

The State of California has held,

> In cases involving "suspect classifications" or touching upon "fundamental interests" (Footnotes omitted), the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (Citations omitted). Under the strict standard applied to such cases, the State bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions

drawn by the law are necessary to further its purposes. *Serrano v. Priest* (1971) 5 Cal.3d 584, 597.

The State has a compelling interest in the welfare of its children as expressed in many cases, among them *Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777 and *Prince v. Commonwealth of Massachusetts* (1944) 321 U.S. 804, 64 S.Ct. 438, 442.

In California, a Statute may read in conjunction with other, definable sources in order to give the first practical effect. *People v. Superior Court of Alameda County* (1977) 19 Cal.3d 338, 345.

The Supreme Court must utilize the interpretation of state law as promulgated by the Supreme Court of that State. *Wainwright v. Stone* (1973) 414 U.S. 21, 22-23, 94 S.Ct. 190, 192, 338, 345. The Supreme Court in California let stand the opinion of Fifth (5th) Appellate District, in which the trial court's termination of Appellant's parental rights was upheld.

California Civil Code Section 232(a)(4) indicates that a parent may be considered an unfit parent and subject to termination of custody and control of his child if that parent has committed a felony and if the facts of the crime of which that parent was convicted are of a nature so as to prove the unfitness of the parent to have future custody and control of the child. When read with the Statutes

under which the Appellant was convicted, Penal Code Sections 278, and 278.5, the Civil Code Section becomes clear.

Penal Code Sections 278 and 278.5 may be found in Appellant's Appendix E pp. 5-6. Civil Code Section 232 may be found in Appellant's Appendix E pp. 1-4.

Moreover, the Civil Code Section 232.5 provides standards under which Civil Code Section 232 are to be construed:

> The provisions of this Chapter shall be liberally construed to serve and protect the interests and welfare of the child. In all proceedings to declare a child free from parental custody and control, the court shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interests of the child.

The purpose of the Civil Code chapter of which Section 232 is a part is found in Civil Code Section 232.6:

> The purpose of this chapter is to serve the welfare and best interests of the child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life.

Crimes are classified according to severity and punished accordingly. Both the State of California and the United States divide crimes into felonies and misdemeanors. California Penal Code Section 17(a) reads as follows:

> A felony is a crime which is punishable with death or by imprisonment in a State Prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

18 United States Code Section 1(1) reads as follows: "Any offense punishable by death or imprisonment for a term exceeding one (1) year is a felony."

Great discretion is vested in the legislatures of the individual states and classification of individuals by these legislatures will be upheld if the classification rests on grounds even partially relevant to achievement of the states' objective. (*McGowan v. Maryland* (1961) 366 U.S. 420, 425. 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.)

The Legislature of California will be presumed to have mandated a more severe punishment for violations of Penal Code Sections 278 and 278.5 then for such crimes as those described in Penal Code Sections 273(a) or 247(a) (Appellant's Appendix, pp. E-4 and E-6) for a constitutionally-sound reason.

The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Tigner v. Texas* (1940) 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124.

The imposition of a felony conviction upon the Appellant is an expression of the nature of the crime as outlined by Penal Code Sections 278 and 278.5, and a further expression of the seriousness of the crime of which Appellant was convicted. Appellant has indicated that the conviction could have been either one imposing a misdemeanor or a felony sentence. When this alternative is provided in the Code section, however, the trier of fact is to apply the more appropriate of alternative sentences. (*People v. Smith* (1968) 259 Cal.App.2d 868, 873.)

The court has noted, in *People v. Irwin* (1984) 155 Cal.App.3d 891, 899, heightened culpability involved with

Penal Code Section 278, and the court noted ". . . malice, the element required for violation of Section 278 . . . is a term of art which imports a higher level of culpability . . .".

Appellant was not charged arbitrarily. He was charged with violation of the law which was applicable to his behavior. Penal Code Sections 273(a) and 647(a), both misdemeanors, to which Appellant compares Penal Code Sections 278 and 278.5, do not describe the behavior in which Appellant participated. Appellant did not physically injure his child in any manner. Appellant committed a crime against the other parent. *People v. Campos* (1982) 131 Cal.App.3d 894, 899.

Appellant was charged under the Penal Code Section which applied to the action which he took. Appellant's sentence, which classified his conviction as that of a felony, was applied to Appellant because that was the most appropriate sentence for the actions that he undertook.

The State of California, however, is not simply predicating termination of parental rights on conviction of a felony or a misdemeanor. Civil Code Section 232 contains the modifying phrase ". . . if the facts of the crime of which the parent or parents were convicted however the nature as to prove the unfitness of the parent or parents to have the future custody and control of the child."

The trial court sat through days of testimony in order to determine that this modifying phrase was satisfied. During this trial, the Appellant had extensive opportunity to present evidence in support of his position.

Appellee also calls the attention to the fact that it is not the State of California which is acting to terminate

Appellant's parental rights. It is, in fact, the other parent who is taking this action. The fact that it is one private individual against another private individual underlines the need for "fundamental fairness." (*Santosky v. Kramer* (1982) 455 U.S. 748, 102 S.Ct. 1388, 71 L.Ed.2d 599). The concerns about the state's unfair advantage and the protections that must be afforded the private citizen, as expressed in *Matthews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 are muted to the extent that in this case, each party has equal access to the court, equal access to money, or lack thereof, and equal access to time.

Since the parties are equal, then the concern of the court should be fundamental fairness, and since there was an extensive hearing, the need for fundamental fairness has been satisfied and Appellant's rights to Due Process have not been violated.

Had the Code Section not contained the mitigating phrase regarding an indication of unfitness to continue care and custody of the child, then the Code Section might be unconstitutional. In that event, there would be no relationship between the Code Section and the end which it was attempting to achieve, as is required by the strict scrutiny standard as expressed in *Serrano v. Priest* (1971) 5 Cal.3d 584, 597. As it is written, however, the Code Section narrows the application of a parental termination proceeding to apply only when the felony of which the parent was charged indicates that some harm may come to the child. This is a direct correlation with the state's concern for the welfare of its children.

———o———

## VAGUENESS OF PETITION

Appellant charges that the Petition filed by the Appellee was too vague to enable him to adequately defend against it.

Appellant made no demurrer to the Petition when it was filed initially, indicating that Appellant did not find the Petition vague initially.

Procedural Due Process requires that notice which is appropriate to the nature of the case. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.)

The Court has also noted that, "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (*Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230.)

A generally higher standard of notice will be required to comport with a fundamental interest such as parenting. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758, 102 S.Ct. 1388, 1397, 71 L.Ed.2d 599.)

California has complied with this standard of notice for the Appellant.

California Code of Civil Procedure Section 469 notes that to be fatal, a variance in pleading must have misled or served to mislead the adverse party. The Petition for termination of the Appellant's parental rights alleged the felony of kidnapping as the basis upon which the action was brought. There is nothing misleading in this allegation.

Appellant states that this was inadequate notice to enable him to sufficiently defend his position.

The Court has noted that legal documents can be read in conjunction with the activities with which they are concerned. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110-111, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222.)

In *Grayned,* the Court was considering a statute that prohibited disturbances near a school, and noted that the Court could look at the prohibited activities and measure them against their affect on the normal activities of a school.

This Petition presents a very similar situation. True, the Petition simply states that it is based on the Appellant's kidnapping of the little girl; however, Appellant had taken such actions upon three (3) occasions and had been convicted for the third kidnapping. He has committed no other felonies. Again, when read in conjunction with the charging statute, Civil Code Section 232, it provides sufficient notice for Appellant that he will be obligated to defend against the aspects of a kidnapping or of this kidnaping that render him unfit to continue with the care and custody of the little girl. Had there been a number of felonies, or had the effect of the felonies varied each time, or had there been some other aspect about the felony that rendered it confusing as far as the Petition went, this allegation would be germane. This, however, is not the case.

The Appellant cites *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 as standing for specificity in Petitions. However, in *Gault* the parents of the child were

given no notice at all of the charge, or any factual basis for the judicial action, which it initiated. Additionally, no testimony was elicited from the complainant. And again, *Gault* concerned an action by the State against an individual. In *Gault*, the Petition specified only that "said minor is a delinquent minor." *In re Gault* (Supra) 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527. The Court expressed concern that the alleged misconduct was not outlined sufficiently for the accused to defend. After all, delinquency could be defined in many different ways.

In this case, kidnapping is quite specific. The aspects of kidnapping that could render the parent unfit to act as the caretaker of the child in the future, are not so varied that it is impossible for the Appellant to determine how to proceed with his case.

———o———

## CONCLUSION

Civil Code Section 232 is not vague, initially because the clause under which the Appellant lost custody and control of his child is modified by a phrase which provides a specific relationship between the felony and the goal that the State is accomplishing through this statute, that of protecting its minor children.

Any classification of individuals under this law is a result of classification under the relevant Penal Code Sections, and has been done based on the seriousness of the crime and the crime's relationship to the child. The law is specific and is directed toward protection of children.

The application of the law is not vague. The Appellant's parental rights were not terminated in a vacuum. There was no arbitrary and ad hoc in determination that the Appellant should lose his parental rights. On the contrary, the Trial Court heard days of testimony, including that of the psychologist of whom Stacy had been a patient since after the second kidnapping. If protection of children is to mean anything, the laws surrounding the children must be formulated in such a fashion that they can be applied to the myriad of situations in which human beings will find themselves. Civil Code Section 232 is to be considered by the Court in the light of Section 232.5 and 232.6, both of which interpret how 232 is to be construed and its purpose.

Appellant's due process rights under the 14th Amendment to the United States Constitution have been protected by the public hearing of the issue, which provided him every opportunity to explore the parameters of Section 232 and to defend against the allegations contained within the Petition.

The allegations within the Petition are specific enough also to provide ample protection for the Appellant's due process rights. Appellant was convicted of one felony, and, unless the Petition seriously misled the Appellant as to the nature of the allegation, he will be considered to have had adequate notice of the charges against which he had to defend. There was no misleading in this Petition, it was very straightforward. The Appellant realized that he had to defend against the aspects of kidnapping that would render him unfit to maintain custody and control of this child. The Appellant obviously knew that he had

not harmed his child, so he could easily recognize the remaining facets that would be inherent in the affect of a kidnapping on a child.

In short, the Appellant has had a fair opportunity to defend against the loss of his parental rights and if he has lost these rights, it is a result of his own actions and not a result of any failure of the legal system to deal with him in any way that has obscured his legal rights.

Respectfully submitted,

DIANNE R. OPHELIA,
*Counsel of Record*
Attorney at Law
*Counsel for Appellee*

and

KATHLEEN B. GOSHGARIAN
*Of Counsel*
Attorney at Law
800 M Street
Fresno, California 93721
(209) 268-4021

## APPENDIX A

Texts of Statutory Provisions

### CALIFORNIA CODE OF CIVIL PROCEDURE

Section 469. No variance between the allegation in a pleading and the proof is deemed to be material, unless it actually misled the adverse party to his prejudice in maintaing his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended upon such terms as may be just.